may be seized under section 110(I). For the purpose of disposal these are to be treated alike, that is to say, forfeiture must be ordered if they are proved to the satisfaction of the court to fall into either category. In order to achieve this effect, the draftsman has resorted to using the expression 'goods' in the sense of the original definition in section 2, which is applicable, to, and embraces, both categories of things which may be seized.

We are therefore of the opinion that the learned President has no discretion to order the release of the motor car and that the appeal was properly allowed in accordance with the principle laid down by Wilson J. in *Ng Ham's* case." (The words in brackets are mine).

I also lay emphasis on the wording of section 127(1) at the last clause which states "notwithstanding that no person may have been convicted of such offence".

The respondent company was acquitted and discharged because its officers and agent had no knowledge that the goods were uncustomed. The items are still uncustomed goods and are fixed to the boat. Without the two engines the boat will not move and without the other items especially the seats, the boat will not be able to ply for hire. In fact all the others are essential to the needs of passengers. I hold the view that the boat itself in its entity is the subject matter of the offence and falls under category (a). Alternatively, if I am wrong, it falls under category (b). The learned President is therefore right in holding that he was left with no option but to order the forfeiture of the boat. I do not agree that section 17(a) applies as no duty has been paid or short paid through any inadvertence, error or misconstruction on the part of any Customs officer. The cross-appeal is dismissed.

Order of forfeiture confirmed.

Order accordingly.

Solicitors: *Lim Huck Aik & Co.*

ASTIM PERKHIDMATAN PENGANGKUTAN SDN. BHD. v. UTARAYA TRADING SDN. BHD.

[O.C.J. (Arulanandom J.) May 29, 1978]
[Penang — Civil Suit No. 356 of 1977]

Practice and Procedure — Summary judgment — Admission of part of claim — Judgment by consent for sum admitted and unconditional leave to defend claim for balance — Counterclaim — Injunction restraining defendant from receiving payments — R.S.C., 1957, O. 14, O. 21 r. 15.

The defendants were the main contractors to the Lembaga Padi dan Beras Negara (L.P.N.) for certain works and services to be rendered to the L.P.N. The plaintiffs were subcontractors to the defendants. The plaintiffs claimed $16,655.90 for works and services rendered. The defendants by their defence admitted owing a sum of $12,177.70 to the plaintiffs. They also filed a counterclaim claiming that because the plaintiffs had committed a breach of the subcontract the defendants had suffered loss and damage. Soon after the writ was issued, the plaintiffs obtained an *ex parte* order restraining the defendants from receiving any payments from L.P.N. Subsequently they applied by Summons-in-Chambers for leave to enter final judgment against the defendants. In view of the admission in the defence, the Senior Assistant Registrar entered final judgment by consent for the sum of $12,177.70 and gave unconditional leave to the defendants to defend the claim for the balance. The defendants thereupon prayed for a stay of execution of the final judgment on the grounds that they had a counterclaim against the plaintiffs. The learned Senior Assistant Registrar ordered stay of execution pending the trial. The plaintiffs (a) appealed against the decision of the Senior Assistant Registrar to stay the execution of the final judgment and (b) for an order that the counterclaim be struck out. The defendants applied for the injunction obtained by the plaintiff to be discharged.

Held: (1) in this case as a consent order had been made and in view of the counterclaim the proper order was judgment and a stay pending determination of the counterclaim;

(2) the claim and counterclaim were so closely related that the defendant's claim was rightly brought as a counterclaim;

(3) the defendants had not discharged the onus on them to show that the injunction was wrongly obtained;

(4) on the defendants depositing the amount of the judgment in court and on their giving security to the satisfaction of the Senior Assistant Registrar, the injunction should be dissolved.

Case referred to:-

(1) *Wah Loong (Jelapang) Tin Mine Sdn. Bhd.* v. *Chia Ngen Yiok* [1975] 2 M.L.J. 109, 114.

CIVIL SUIT.

Tan Phock Kin for the plaintiffs.

Balwant Singh for the defendants.

Arulanandom J.: In this matter there were three applications made in chambers but because they were inter-related and would require time for argument, they were all adjourned to open court and heard together.

The brief history of the matter is as follows. The plaintiffs are subcontractors and the defendants main contractors to the Lembaga Padi dan Beras Negara (L.P.N.) for certain works and services to be rendered to the L.P.N. The defendants sub-contracted some of the works to the plaintiffs. As a result of payments not being made to the plaintiffs for works and services rendered, the plaintiffs issued this writ against the defendants. The claim was for the sum of $16,655.90 and interest and costs. The defendants by their defence admitted owing a sum of M$12,177.70 to the plaintiffs and also filed a counterclaim claiming that because the plaintiffs had committed a breach of the sub-contract dated April 30, 1976 by unilaterally terminating it on April 26, 1977 the defendants had suffered loss and damage and thereby the plaintiffs were liable in damages and costs to the defendants.

Soon after the writ was filed the plaintiffs obtained an *ex parte* order restraining the defendants from receiving any payments from the L.P.N. with the usual undertaking as to damages.

The plaintiffs then applied by summons-in-chambers for leave to enter final judgment against the defendants for their claim against them. The application was supported by the affidavit of one Abdul Hady bin Ismail the manager of the plaintiffs affirmed on July 25, 1977, deposing that the defendants had no valid defence to their claim. By a supplemental affidavit affirmed on August 2, 1977, the said deponent filed documents and statements of accounts verifying their claim.

The defendants opposed the application.

The Senior Assistant Registrar who heard the application, in view of the admissions in the defence, entered final judgment by consent in favour of the plaintiffs for the sum of $12,177.70 and gave unconditional leave to the defendants to defend the claim for the balance.

The defendants thereupon prayed for a stay of execution of the final judgment on the ground that they had a counterclaim against the plaintiffs. The plaintiffs contended that the counterclaim had nothing to do with the contract between the plaintiffs and defendants and therefore had no bearing on the judgment entered and was not made *bona fide*.

The learned Registrar held that the counterclaim was *bona fide*, or at least the issue was triable and that it was connected with the plaintiffs' claim and ordered a stay of execution pending the trial.

The matters before me now are the following.

In Notice of Appeal (Encl. 12) dated August 9, 1977, the plaintiffs appealed against the decision of the Senior Assistant Registrar to stay execution of the final judgment pending the outcome of the claim.

By summons-in-chambers dated August 13, 1977 (Encl. 15) the plaintiffs applied for an order that the counterclaim in this action be struck out as disclosing no reasonable cause of action against the plaintiffs or further and in the alternative be excluded pursuant to Order 21 rule 15 of the Rules of the Supreme Court in that it ought not to be disposed of by way of a counterclaim but in an independent action.

By summons-in-chambers dated August 13, 1977 (Encl. 18) the defendants pray that the injunction obtained by the plaintiffs on July 26, 1977 be dissolved.

I see no merit in the appeal against the order of stay. If the defendants had not consented to judgment in the admitted sum of $12,770.70, the court could have given unconditional leave to defend. But in the event as a consent order had been made, in view of the counterclaim, the proper order was judgment and a stay pending determination of the counterclaim.

The law is clearly set out in *Mallal's* Supreme Court Practice (at page 145) under the heading 'Counterclaim': —

"*Counterclaim.* — If a defendant has a *bona fide* counterclaim which appears to contain some good grounds for argument and is connected with the subject-matter of the plaintiff's claim, leave to defend should be given. *H. Abdul Shukoor* v. *E. Mohamed Kassim*, [1927] S.S.L.R. 67. If, however, the counterclaim is not connected with the subject-matter of the plaintiff's claim, and the defendant has clearly no other answer, there should be judgment for the plaintiffs on the claim, with a stay of execution until the trial of the counterclaim, or pending further order.

'Where the counterclaim amounts to an equitable set-off, it is only right that the judge should deal with the claim and cross-claim as one, and looked at in that way it seems to me that no valid distinction can be drawn between the way in which he should exercise his discretion in regard to the claim and in regard to the counterclaim,' *per* Parker L.J. *Baylis Baxter* v. *Sabath*, [1958] 2 All E.R. 209; [1958] 1 W.L.R. 529, C.A. In *Morgan & Son* v. *Martin Johnson & Co.*, [1949] 1 K.B. 107; [1948] 2 All E.R. 196, C.A. the plaintiffs claimed by specially indorsed writ charges for storage of vehicles and telephone calls. The defendants admitted the claim, but contended that due to plaintiffs' negligence as bailees one of the vehicles has been lost. Lynskey J., gave the plaintiffs leave to sign final judgment on their claim under this Order with a stay of execution pending trial of the defendants' counterclaim. On appeal it was held that the case was one in which a court of equity would have allowed the defendants relief by way of equitable set-off, the proper order was that they should be given unconditional leave to defend."

Therefore the appeal is dismissed with costs.

In the case of summons-in-chambers to strike out the counterclaim (Encl. 15) I again see no merit in this. The law again is clearly stated in the commentary in *Mallal's* Supreme Court Practice on Order 21 rule 15 at page 290: —

"*Exclusion of Counterclaim.* — A counterclaim is substantially a cross-action and 'is to be treated for all purposes for which justice requires it to be so treated as an independent action,' *per* Bowen L.J., in *Amon* v. *Bobbett*, 22 Q.B.D. 548, referred to in *Koh Chooi Peng* v. *Chung Kok Sang*, *infra*. See *India High Commissioner* v. *Gosh*, [1959] 3 W.L.R. 811; [1959] 3 All E.R. 659, where the High Commissioner of India sued *G.* for the return of money which had been lent to *G.* *G.* counterclaimed in respect of an alleged slander. The Court of Appeal affirmed the decision that the counterclaim be struck out, since the alleged slander had no material bearing on the monetary claim."

Here the claim and counterclaim are so closely related that it should be brought as a counterclaim. The main contract between the defendants and L.P.N. although different from the contract between plaintiffs and defendants is dependent on the latter for the proper performance of the former by the defendants. And if as a result of a breach in the latter contract by the plaintiffs, the defendants suffer damage in the former contract as a result of failure of performance, then their claim for damages from the plaintiffs is clearly related to their having to pay the plaintiffs for their performance or non-performance of the latter contract.

For these reasons the summons is dismissed with costs.

With regard to the summons-in-chambers by the defendants to dissolve the injunction (Encl. 18) I find the defendants have not discharged the onus on them that the injunction was wrongly obtained. The mere fact that balance of convenience is against the defendants is not sufficient ground to dissolve an injunction. As Abdoolcader J. said in *Wah Loong (Jelapang) Tin Mine Sdn. Bhd.* v. *Chia Ngen Yiok*[1]:

"Sometimes, however the circumstances in which an interlocutory injunction is made are such that if an interlocutory injunction is granted the benefits or advantages which the plaintiff thereby receives are all, or practically all, the benefits or advantages which are sought to be secured at the final hearing. It does not follow, however, that in such a case an interlocutory injunction will necessarily be refused (*Woodford* v. *Smith*); the question remains one of the balance of convenience in all the circumstances."

The defendants' counsel has stated they (the defendants) are a running concern with ability to pay. I therefore order that on the defendants depositing $12,770.70 in court or sufficient security to the satisfaction of the Senior Assistant Registrar that if at the end of the trial, judgment is in favour of the plaintiffs, the plaintiffs will be able to recover the judgment debts from the security provided to the Senior Assistant Registrar the injunction be dissolved. Costs in the cause.

Order accordingly.

Solicitors: *Thillaimuthu & Phock Kin; Malik Salleh & Co.*